No. 86-228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUOZAS KUNGYS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF THE BALTIC-UKRAINIAN-AMERICAN COMPACT, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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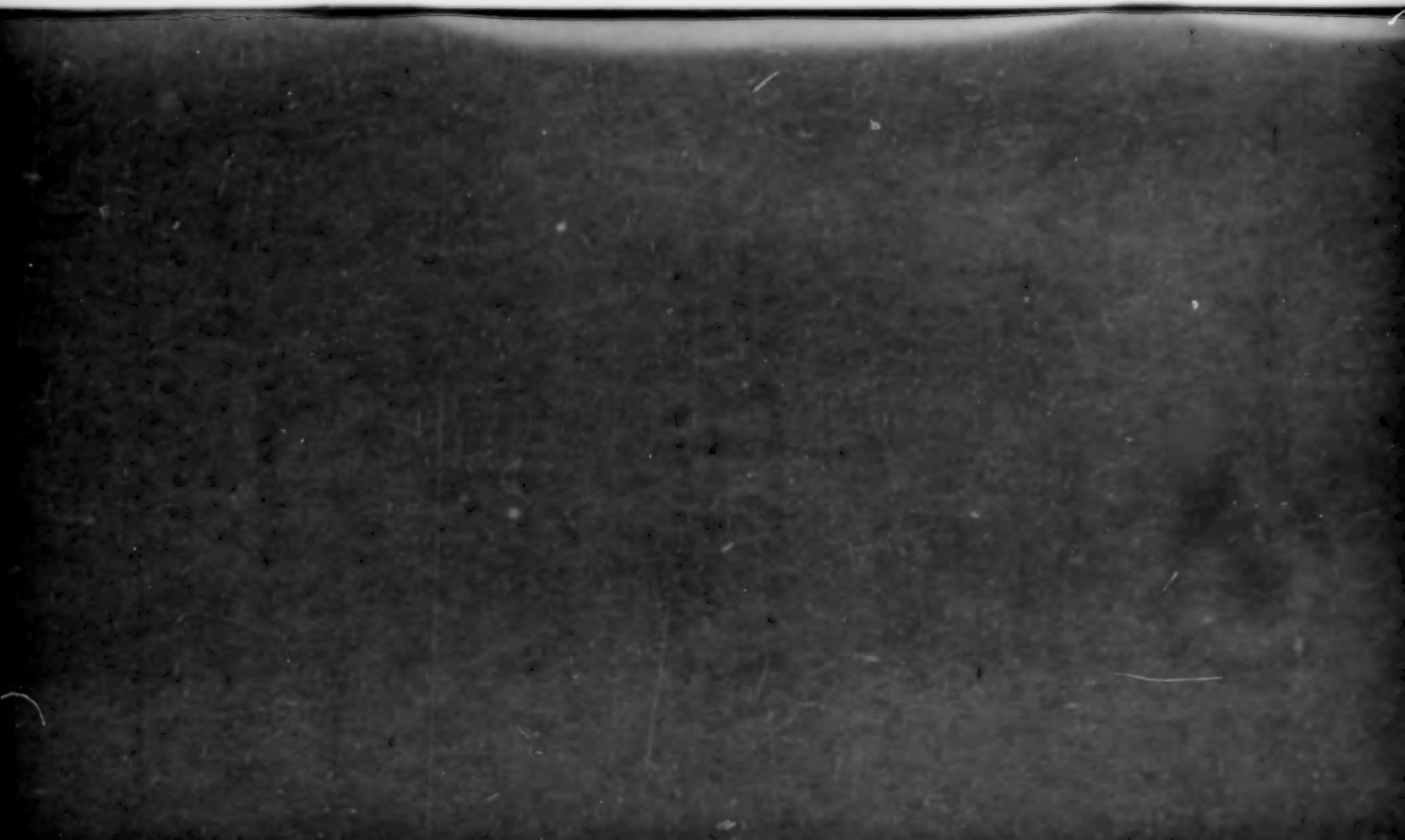

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MOTION OF THE BALTIC-UKRAINIAN-AMERICAN COMPACT, ET AL. FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The Baltic-Ukrainian American Compact, the Coalition for Constitutional Justice and Security, the American-Lithuanian Rights Fund, Inc., the Estonian-American National Council, Inc., the Ukrainian-American Justice Committee, the Americans for Human Rights in Ukraine, and the Ukrainian National Center: History and Information Network, hereby move for leave to file the attached brief amicus

curiae supporting petitioner in Kungys v. United States, No. 86-228.

Amici are organizations who represent or whose members include naturalized United States citizens of Estonian, Latvian, Lithuanian and Ukrainian descent. A group of similar organizations previously obtained written consent, filed with the Clerk of the Court, from both petitioner and respondent for the filing of an amici curiae brief in support of the Petition for Certiorari. See Brief and Appendix Amicus Curiae in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. The interests of the current amici are identical to those of the amici who obtained previous written consent. Three of the amici herein represented -- the Coalition for Constitutional Justice and Security, the Estonian-American National

Council, and the Ukrainian American Justice Committee -- were part of the group which obtained prior consent. Since the remaining four amici were not, this motion is necessary.

The background and concerns of amici are fully set forth in the Interest of Amici Curiae section of the attached brief. On the basis of the interest there set forth, amici respectfully seek the Court's leave to file the attached brief on the merits.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Baltic-Ukrainian-American Compact, the Coalition for Constitutional Justice and Security, the American-Lithuanian Rights Fund, Inc., the Estonian-American National Council, Inc., the Ukrainian-American Justice Committee, the Americans for Human Rights in Ukraine, and the Ukrainian National Center: History and Information Network are organizations

which represent or whose members include naturalized United States citizens of Estonian, Latvian, Lithuanian, and Ukrainian descent. Many of these individuals are former refugees or displaced persons who fled from their homelands before the advancing Soviet armies towards the end of World War II. They subsequently were unable to return to their homelands after the War for fear of political persecution by the Soviets, and eventually obtained immigration visas from United States Consulates in Germany and Austria for entry into this country.

Two-thirds of the denaturalization proceedings that have been brought by the Justice Department Office of Special Investigations have been against Americans of Baltic and Ukrainian descent. Yet, only 26 % of the total displaced persons admitted into the United States after World War II were of Baltic or Ukrainian

descent. See 1983 Statistical Yearbook of the Immigration and Naturalization Service, U.S. Dept. of Justice, Table 6B. These prosecutions have been based upon information and "evidence" provided by the Soviet Union, a totalitarian government which has a strong interest in discrediting Baltic and Ukrainian emigres because they help perpetuate the nationalistic commitment of those who remain in the Soviet-occupied Baltic and Ukrainian territories, and otherwise seek an end to Soviet occupation. Amici therefore have a strong interest in ensuring that the immigration law issues in this case are decided in a way which does not allow the Soviet Union to manipulate those laws to its own political ends and at the expense of Baltic and Ukrainian Americans who are innocent, notwithstanding suspect Soviet evidence, of participation in the war crimes of Nazi Germany.

Many Baltic and Ukrainian emigres were either themselves victims of persecution during the German occupation, or had family or friends executed by the Nazis. Thus, ultimately, it is the interest of amici that Nazi war criminals within U.S. borders be brought to justice. At the same time, amici wish to ensure that such justice is not obtained through a misreading or misapplication of our immigration laws, particularly where it undermines our commitment to the constitutional rights of the accused.

STATEMENT OF THE CASE

A. The Unique Nature of Petitioner's Case

1. The Prosecution of War Crimes Cases in a Civil Setting

Petitioner's case was prosecuted by the Office of Special Investigations ("OSI"), an office established by the Attorney General in 1979 within the Criminal Division of the United States

Department of Justice. All "war criminal" files opened by the Immigration and Naturalization Service were transfered to OSI at that time. The establishment of OSI and its pursuit and prosecution of accused Nazi war criminals was largely a result of the impetus which the so-called "Holtzman amendment," Pub. L. 95-549, §§ 101-105, 92 Stat. 2065 (1978), to the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 et seq. (1986), along with related appropriation measures, gave U.S. efforts to identify and deport Nazi war criminals found within its borders.

It is significant to note that the Holtzman amendment did not attempt to bring Nazi war criminals to justice by conferring qualified jurisdiction on United States courts or seeking to set up a special international tribunal to try and punish these individuals for their crimes in a manner consistent with

American standards of criminal justice. Instead, the amendment relied exclusively on the tool of denaturalization and deportation to deal with such individuals. In essence, the amendment requires the deportation, or exile, of persons shown to have participated in Nazi persecution during World War II, and eliminates the Attorney General's power to grant such persons discretionary relief. In other words, the deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result. See 8 U.S.C. §§ 1251(a)(19), 1253(h), and 1254(e).

In contrast, the Canadian government has opted to follow the recommendations of its Deschenes Commission Report, (See Report of the Commission of Inquiry on War Criminals, Ottawa, Canada, December 30, 1986) which concluded that all war criminals within its borders, not just

Nazi war criminals, should be apprehended, tried and punished under Canadian rules of criminal procedure. The Canadians intend to assert criminal jurisdiction over such individuals under the "universality principal." See generally, Cowles, Universality Jurisdiction Over War Crimes, 33 Cal. L. Rev. 177 (1945).

Regrettably, the net effect of the approach taken by the Holtzman amendment has been to allow OSI to try what amount to capital cases in a civil setting, without providing the defendants with any of the safeguards that they would normally be afforded in a criminal trial, or even in an extradition proceeding. Among the more important safeguards which are lacking in these "war crimes" denaturalization cases are the right to a jury trial and the requirement that the government prove guilt beyond a reasonable doubt. Perhaps most importantly, in

contrast to criminal cases, a defendant's refusal to testify in a denaturalization case is construed against him. Petitioner attempted to gain one of these safeguards by filing a motion for a jury trial. The motion was denied by the District Court, however, and that issue was not addressed by the Court of Appeals (Pet. for Cert. at 9 n.3).

2. The Government's Reliance on Soviet Supplied Evidence Where the Soviets Have a Motive to Fabricate

Compounding the lack of due process safeguards commensurate with the serious consequences of these unique denaturalization proceedings, is the fact that, in a majority of its cases, OSI has relied almost entirely on the cooperation of the Soviet government to provide it with evidence to identify alleged war criminals and to support its cases for denaturalization. This fact was not lost upon the District Court:

> The prosecution of this case results from an unusual cooperative effort of the Office of Special Investigations ("OSI") and Soviet authorities. The Soviet authorities have provided documents from archives under their control and, more important, they have assembled, interrogated and produced for deposition the witnesses whose testimony is critical if the government's principal charges are to be sustained.

(Pet. App. 86a-87a). In fact, OSI has relied on Soviet "evidence" in two-thirds of its cases. A recent press report indicates that the Soviet news agency Tass reported that the Soviet procurator's office has provided 150 names to the United States over the last 10 years. "Soviets Execute Ex-Nazi Guard," The Washington Post, p. A10 (July 28, 1987).

All of these Soviet-backed cases have been brought against Baltic and Ukrainian emigres. The Soviet "evidence" purports to establish the voluntary participation of these emigres in the killings of the Baltic and Ukrainian

Jewish population and Soviet citizens under the direction of the Germans. The fate of two individuals who were deported to the Soviet Union after denaturalization proceedings successfully prosecuted by OSI on the basis of Soviet evidence demonstrate the gravity of the results of in such cases. As recently reported in the national press, see e.g. "Soviets execute Nazi Fedorenko," The Washington Times, p. A7, July 28, 1987, Fyodor Fedorenko was executed by the Soviets after a Soviet "trial" 1/ for war crimes,

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1/ As found by the District Court, "[c]ases involving charges of war crimes were and are treated by Soviet authorities as political cases" (Pet. App. 93a). Political cases generally involve inhabitants of ethnic republics seeking independence, religious persons, and political dissidents (Pet. App. 91a). Such cases are only nominally controlled by codes of criminal procedure; they are subject to party control and investigated by the KGB (Pet. App. 91a). In political cases, "reliance [can] not be placed on the formal safeguards written into Soviet law to protect a defendant" (Pet. App. 90a). While testimony and other evidence in such cases are not necessarily false, (continued)

see Fedorenko v. United States, 449 U.S. 490 (1981); and Karl Linnas died after undergoing two operations at the hands of Soviet prison doctors. See United States v. Linnas, 527 F. Supp. 426 (E.D.N.Y.), aff'd, 685 F.2d 427 (2d Cir.), cert. denied, 459 U.S. 883 (1982); and Linnas v. I.N.S., 790 F.2d 1024 (2d Cir.), cert. denied, 93 L.Ed.2d 600 (1986).

In the case at bar, however, much of the evidence provided by the Soviets was excluded by the District Court as unreliable. The District Court specifically found that the Soviet government had a strong motive to discredit Baltic emigres in order to legitimize its hold upon the occupied

---

"where the evidence does not support the desired results there is intense pressure to remold it" (Pet. App. 92a). These findings were based upon the credible and uncontroverted testimony of former KGB members and Soviet lawyers who described how the Soviet legal system works in practice (Pet. App. 86a-95a).

Baltic states. In fact, uncontroverted evidence presented by the petitioner demonstrated that the Soviet Union has taken steps "to counter the influence of emigres from the Baltic states" (Pet. App. 87a). One such step was the establishment of a KGB agency in Latvia called "Motherland's Voice." Motherland's Voice disseminated

> propaganda designed to discredit Latvian emigres abroad by characterizing them as war criminals or collaborators during the German occupation or by characterizing them as acting under orders of western intelligence agencies. Somtimes the charges were true; sometimes they were fabricated.

(Pet. App. 88a). Another KGB agency with a similar mission was the Latvian Committee for Cultural Relations of Latvians abroad:

> Its objective was also to discredit Latvian emigres, particularly those who actively sought the end of the Soviet occupation. This was accomplished by publication of books and articles purporting to describe the war crimes and collaboration of which emigres were guilty. The

> facts were often embellished and supplemented with forged documents, false testimony and pure invention. When [former KGB agent Lesinskis, a chairman of the Committee's presidium,] was assigned to a post in the United States, [his] job was to obtain information about Latvian communities abroad, to promote discord within them and to discredit their leaders. All of this was a KGB function.

(Pet. App. 88a) (Emphasis added).

A similar KGB agency exists for Lithuania. Id. 2/

B. The History Underlying the Soviet Interest In these Cases

At various points in its opinion, the District Court took note of the historical background of the alternating Soviet and German invasions and occupations of Lithuania which gave rise

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2/ The Soviets engage in the same kind of propaganda activities against Zionists, accusing them of having collaborated with the Nazis to send innocent Jews to their death. See U.S. Department of State, Nineteenth Semiannual Report by the President to the Commission on Security and Cooperation in Europe (CSCE) on the Implementation of the Helsinki Final Act, April 1, 1985 - October 1, 1985 (1985) at 13.

to this Soviet interest in discrediting Lithuanian and other Baltic emigres. Because of its importance to understanding the potential impact of the Court's ruling on the issues now before it, we set forth the pertinent portions of that history as recited by the District Court:

> For centuries Lithuania, like the other Baltic states, has been in the path of conquerors from the east and from the west, see, e.g., Massi, Peter the Great (Alfred A. Knopf 1980); Hatton, Charles XII of Sweden (Weybright and Lalley 1968). Once extending from the Baltic to the Black Sea, Lithuania ceased to exist as a nation altogether in 1795 at the time of the Third Partition of Poland by Russia and Prussia.
>
> At the time of the Russian Revolution in 1917 Lithuania was occupied by Germany. It declared and achieved its independence on February 16, 1918. During the interwar years, according to documents submitted by the government in this case, Lithuania looked primarily to France and England for cultural, political and military resources.
>
> The years 1939-40 marked the extinction once again of independent Lithuania. Nazi Germany, having absorbed Czechoslovakia's Sudetenland after the Munich Pact,

occupied Czechoslovakia's principal provinces of Bohemia and Moravia on March 15, 1939. On March 23 Germany seized, without resistance, Lithuania's City of Memel. Preparations then began for the invasion of Poland, scheduled for September 1.

Seeking to avoid fighting simultaneously against major powers on the east and the west, Germany entered into negotiations with the Soviet Union. On August, 1939 the German-Soviet Non-Aggression Pact was signed. Discovered after the War in German archives were the secret protocols in which Germany and the Soviet Union divided between them Poland and the Baltic states. At that time Lithuania was allocated to Germany, Latvia and Estonia to the Soviet Union.

Thus secured against the Soviet Union in the East, Germany attacked Poland on September 1, rapidly overcoming the Polish armed forces. On September 17, implementing the secret protocols, the Soviet Union invaded Poland. On September 28 Germany and the Soviet Union executed a German-Soviet Boundary and Friendship Treaty, establishing their common frontier in Poland. Another secret protocol added Lithuania to the Union's share of the seized territory. Later in 1939 the Soviet Union invaded Finland. In June 1940 Lithuania was occupied by and in due course incorporated into the Soviet Union. Its brief period of independence came to an end.

> Lithuania was a predominantly Roman Catholic country. The political and social reorganization of the nation required to transform it into a Soviet province entailed deportation of political and business leaders, intellectuals and Catholic priests.

(Pet. App. 47a-48a).

* * *

> On June 22, 1941 Germany launched a massive attack upon the Soviet Union at all points along the lengthy frontier. Army Group North [the German Army Group assigned to attack through the Baltic states with the objective of capturing Leningrad] moved into Lithuania and the other Baltic countries which the Soviet Union had occupied pursuant to the secret protocols of the 1939 Non-Aggression Pact and Boundary and Friendship Treaty between it and Germany. Einstazgruppen A [the German SS units organized to annihilate the Jewish population in the east] under [Brigidier General] Stahlecker followed close at its heels.
>
> As the Soviet occupation forces retreated, groups of Lithuanians organized to attack them and to aid in securing self rule once again. Efforts were made to establish a provisional Lithuanian government, efforts which were quickly terminated by the German authorities.
>
> At the outset, at least, many Lithuanians viewed the Germans as

liberators from Soviet oppression, a view which facilitated the Germans' plan to use the Lithuanians for their own ends.

(Pet. App. 51a-52a).

* * *

Unlike the prospects faced by the resistance movements in the western nations conquered by Nazi Germany, in Lithuania the defeat of Germany did not ensure return to independence. Rather it was quite likely that Germany's defeat would simply result in the reinstatement of Soviet tyranny and religious oppression. Nevertheless, a resistance movement arose which opposed both the German occupation and renewed Soviet rule. This took place during the period from 1941 through mid-1944. During the early part of that period the Germans were enjoying staggering military successes in the Soviet Union, conquering vast territories and inflicting huge losses upon both military personnel and civilians. During the latter part of the period the Soviet Union inflicted similar losses and defeats upon the German armies driving them back towards Poland and the Baltic states. At the the same time the western forces mounted offensives in Africa, Sicily and Italy and prepared for the cross-Channel invasion of France. During all that time the Nazis pursued their goal of killing the remaining Jews of eastern Europe and the Jews of western Europe, establishing the death camps in

Poland and Germany.

(Pet. App. 65a).

* * *

On April 25 [1945] units of the American and Soviet Armies met at the Elbe River. The partition of Germany and Berlin into the Soviet, American, British and French zones was effected. Poland and the Baltic states were occupied by Soviet troops. Although a truncated Poland allied with the Soviet Union emerged from the War, the Soviet Union proceeded to incorporate into itself Lithuania and the other Baltic states.

(Pet. App. 68a).

* * *

Many thousands of Lithuanians fled the country as the Soviet army approached in 1944. No doubt a number of these refugees were persons who had collaborated with the Germans and some no doubt had participated in the killing of Lithuania's Jewish population. Many thousands were not guilty of such offenses and of that number at least some had engaged in resistance to the German regime. These thousands fled from a renewed Soviet tyranny and frequently to avoid possible execution or deportation.

Despite Soviet conquest there remain strong nationalistic feelings and continuing allegiance by a significant portion of the

> population to the Roman Catholic Church. The attempts by Soviet authorities to stamp out these influences and to create the myth of historic friendship between the people of the Soviet Union and its various national groups are weakened by the presence abroad of large groups of emigres who experienced personally the effects of Soviet occupation and who help keep alive Lithuanian national and religious convictions.

(Pet. App. 87a)

* * *

> The Soviet Union's seizure and continued occupation of Lithuania has been accomplished by force, executions, deportation of Lithuanians and resetlement of non-Lithuanians in Lithuania.

(Pet. App. 89a).

On the basis of this historical background, and the uncontroverted testimony of former KGB agents describing specific Soviet steps and programs to discredit Baltic emigres, the District Court found that "the Soviet Union's particular interests are served when a United States court finds that an emigre participated in the slaughter of Jewish

citizens or otherwise collaborated with the Germans" (Pet. App. 90a).

C. The Pressure of Circumstances of Post-War Europe Compelled Many Individuals To Misrepresent Identifying Information In Their Immigration Applications Consistent With False Documents They Had Obtained In Order to Survive During the War Years

Under the exigent circumstances of World War II Europe and Russia, many of the thousands of refugees and displaced persons from the Baltic states and Ukraine obtained identification documents which were false in some respect, such as in date and place of birth, in order to avoid consequences which would otherwise befall them from the German authorities who were occupying their territories at the time. These consequences ranged from conscription into units of the German army, to removal to a concentration camp. This was true not just of refugees from the Baltic and Ukrainian areas, but also of a substantial number of the

millions of displaced persons throughout Europe, Jews and non-Jews alike. Petitioner was among such refugees.

When applying for immigration to the United States, many refugees and displaced persons with false identification documents, who were not otherwise disqualified in any way from obtaining a visa, falsely swore to the truth of the identifying documents and the information they contained about date and place of birth. These misrepresentations were made under the force of unique circumstances of post-war Europe. 3/

3/ In fact, in 1979, two bills were introduced in the House and Senate which acknowledged this problem faced by displaced persons who lied about their age on immigration forms because they had obtained false identifying documents during the War in order to survive. See H.R. 6611, 96th Cong., 2d Sess. (1979), and S. 2580, 96th Cong., 2d Sess. (1979). The bills sought to permit such persons to amend their certificates of naturalization to reflect their true date of birth so that they would become eligible for social security benefits.

In the case of Baltic and Ukrainian refugees, such misrepresentations were made out of a very real fear of persecution if they were repatriated to their Soviet-occupied homelands. Many refugees had witnessed first-hand the oppression of the Soviets during the Russian occupation of 1940-1941, when many lost relatives or friends who were either killed or deported by the Russians. 4/ See Brief and Appendix of Amicus Curiae in Support of Pet. for Cert. at 4a-6a and 13a. One of the last acts of the Soviets in the Baltic states before the invasion of Germany in 1941 was the deportation of 60,000 to 70,000 people in a single weekend, June 14-15, 1941, in cattle cars

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4/ For example, "[f]rom July 1940 to June 1941, Soviet authorities carried out massive arrests and deportations. As many as 150,000 people were deported to Siberia and Central Asia." Shtromas, "Political and Legal Aspects of the Soviet Occupation and Incorporation of the Baltic States," 1 Baltic Forum, 26, 44 (1984).

to forced labor camps in Siberia, never to be seen or heard from again. See "Mass Deportations of Populations from the Soviet Occupied Baltic States," Estonia Information Centre, Stockholm, Sweden (1981).

Repatriation, therefore, posed a substantial threat to Baltic and Ukrainian refugees. An unknown number of Balts and Ukraininans were actually deported from the camps into Soviet hands, and press reports of attempts at forced repatriation were discussed throughout the camps. See e.g. Kaslas, La Lithuanie et La Seconde Guerre Mondiale, at 194-197 (1980). The Allies also allowed groups of Soviet representatives to enter the camps, in what became known as "Operation Keelhaul," to try to persuade Balts and Ukrainians to return to their homelands. This in turn created fears that the Allies were abandoning their commitment that Balts and

Ukrainians would not to be repatriated involuntarily. All of this created pressure on the refugees to try to immigrate as soon as possible.

It was against this backgroud that the thousands of refugees who had false identity documents determined that they had no alternative but to write consistent information on their immigration forms for fear that telling the truth would prevent their immigration and result in their imminent repatriation to the Soviet Union. Fear of telling the truth was based in large part on the fact that the language barrier (most refugees had to communicate to immigration officials through an interpreter) significantly increased the chance that they would not be able to adequately explain the reasons why they had to obtain a false identification document during the War. Reinforcing this was the general fear of

authority instilled in displaced persons during the War, many of whom witnessed the constant abuse of authority at the expense of the life or liberty of those who trusted that authority.

D. Unlike the Other "War Crimes" Denaturalization Cases Previously Before This Court, Petitioner Was Not Found To Have Participated In The Persecution Of Civilians

Although petitioner was charged with participation in the persecution of civilians in Lithuania during the War as a ground for denaturalization pursuant to the Holtzman amendment, the District Court found that the government had not met its burden in proving that Kungys had participated in the Kedainai killings as alleged. The District Court made this finding because it found that Soviet evidence upon which the government relied to prove this allegation was unreliable and could not be credited as truthful (Pet. App 106a-109a).

This is in contrast to the cases of Fedorenko v. United States, supra., and United States v. Linnas, supra. In Fedorenko, the Court found that it was undisputed that the defendant was an armed guard at the Treblinka concentration camp in Poland. Fedorenko v. United States, 449 U.S. at 494. In Linnas, the defendant was found by the court to have been the Chief of the Nazi concentration camp in Tartu, Estonia. The district court concluded from the evidence at trial that it was "beyond dispute that defendant, Karl Linnas, 'assisted the enemy in persecuting civilian populations of countries.'" United States v. Linnas, 527 F.2d at 439. Thus, in both Fedorenko and Linnas, the trial courts found the ultimate disqualifying facts that the defendants had participated, whether voluntarily or involuntarily, in the persecution of civilians as part of the

finding that the defendants had unlawfully obtained entry into this country through material misrepresentations.

Although the District Court found no credible evidence that petitioner had participated in war crimes, the Court of Appeals held that petitioner was nevertheless subject to denaturalization because he did not tell the truth about his date and place of birth when applying for a visa and for naturalization (Pet. App 36a-37a). The Court held this even though the government had not proved any fact which would have disqualified petitioner from obtaining a visa. The practical result of the Court of Appeals ruling is that where a war crimes denaturalization case is prosecuted on the basis of Soviet evidence found to be unreliable, the defendant can be stripped of his citizenship, and eventually deported to the Soviet Union were he faces

almost certain death, on the basis of the government proving nothing more than his having lied on his immigration and naturalization forms about his date and place of birth.

ARGUMENT

I. THE STRICT CHAUNT MATERIALITY STANDARD SHOULD BE MAINTAINED AND APPLIED TO ALL FALSE TESTIMONY PROVISIONS OF THE IMMIGRATION AND NATURALIZATION ACT WHICH ARE RELEVANT TO DENATURALIZATION PROCEEDINGS

The Court has restored this case to the calendar for reargument, directing the parties to file briefs addressing several questions concerning the standards for materiality of false statements forming the basis of an order of denaturalization under 8 U.S.C. § 1451(a). Amici do not wish to repeat the many strong arguments on these issues made in petitioner's brief. Amici will focus instead on how the unique nature of petitioner's case underscores the importance of maintaining

the strict standard of materiality set forth in Chaunt v. United States, 364 U.S. 350 (1960), regardless of how the government attempts to denaturalize a citizen under section 1451(a).

A. The Chaunt Standard Of Materiality Should Not Be Diluted Or Abandoned As Urged By The Government

The government has argued in favor of the diluted standard of materiality adopted by the Court of Appeals, or, in the alternative, has urged this Court to replace the Chaunt test with the weaker "capacity to influence" standard applied in cases under the false statement statutes in the criminal code (Br. for U.S. 16-29). The Court should reject both arguments.

It is disingenuous at best for the Government to argue that it is anomalous to require a more exacting standard of materiality in a denaturalization case than in a criminal case where the

defendant's liberty is at stake. Id. at 27-28. As indicated above, the government prosecuted what amounts to a war crimes case against petitioner under the denaturalization statute. The prosecution was initiated on the basis of Soviet evidence which was eventually rejected as suspect by the District Court because of the strong Soviet motive to discredit petitioner. Yet, notwithstanding the fact that the government did not prove that petitioner participated in persecution of civilians, the Court of Appeals is prepared to permit denaturalization simply on the basis of petitioner's misrepresentation about his date and place of birth. If that decision is allowed to stand, petitioner would eventually be

deported to the Soviet Union. 5/ There he would be given a "show trial," and, since it is unlikely that the Soviets will be as critical of their own evidence as the District Court was, he will be executed like Fedorenko and Linnas who have gone before him. But unlike Fedorenko and Linnas, petitioner will be handed over to the Soviets courtesy of U.S. denaturalization proceedings which never resulted in a finding that he was a war

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5/ Although the Attorney General may still have discretion to stay deportation since petitioner has not been found to be a persecutor, "hydraulic" political pressure would in all likelihood prevent such a stay. Also, the experience of Karl Linnas during his deportation proceedings indicates that other countries will be subject to the same political pressure and will be unwilling to accept petitioner simply because he was accused of being a war criminal. Finally, the Soviets pressured the United States to turn Linnas over to them without delay -- after all, the prinicipal goal of Soviet cooperation has been to return these individuals to their custody for trial, and to do so in a way, of course, which avoids the encumbrance of abidding by an extradition treaty, since the Soviets have not signed such a treaty with the United States.

criminal. Stripping petitioner of his citizenship under these circumstances is tantamount to a death sentence without any judicial finding of his having committed a capital crime. It is the equivalent of a death sentence for telling a lie. Where loss of citizenship can lead to these kind of results, there is certainly no anomaly in requiring a greater showing for materiality than the mere speculative test of whether a misrepresentation has "the capacity to influence" the INS.

Accordingly, amici associate themselves fully with the arguments made by petitioner that the Chaunt test requires proof of a fact disqualifying a defendant from immigration or citizenship before a misrepresentation of information, which would have led to the discovery of such a fact upon investigation, can be considered material (Br. for Pet. 9-20). The materiality standard of Chaunt should

only be abandoned if it is construed as requiring less than such a showing by the government.

In addition, a requirement that citizenship be "procured by" the material misrepresentation must also be considered part of the government's burden under section 1451(a), since Congress has required a "procurement" showing in order to disqualify an alien making a material misrepresentation from obtaining a visa. See 8 U.S.C. § 1182(a)(19). It would stand immigration policy on its head to make the government's burden easier in stripping someone of his citizenship than it is in denying an alien a visa.

B. The "False Testimony" Provision of 8 U.S.C. § 1101(f)(6) Requires That The False Testimony Concern A Material Fact And Be Given With The Specific Intent To Deceive

The government has argued that petitioner is also subject to denaturalization under section 1451(a) for

want of good moral character as defined in 8 U.S.C. § 1101(f)(6) (Br. for the U.S. at 45-48). It argues that under the latter section, false testimony "for the purpose of obtaining benefits" under the immigration laws can disqualify a person from citizenship, regardless of whether it is material.

However, wherever Congress sought to deny a person benefits, or revoke his benefits, under the immigration and naturalization laws on the basis of a willful misrepresentation, it has required that the misrepresentation concern a material fact. See 8 U.S.C. §§ 1451(a) and 1182(a)(19). For this reason, we agree with the ruling by the Court of Appeals that the government cannot avoid the materiality requirement by seeking to denaturalize under section 1101(f)(6) (Pet. App. 25a-28a).

In any event, the government here has not established that petitioner's misrepresentations were "for the purpose of obtaining benefits under this chapter. This is a specific intent requirement written explicitly into section 1101(f)(6). The government must prove the petitioner's state of mind, his "purpose" in making the misrepresentation. As in any judicial proceeding where it is an issue, intent is a question of fact which must be proven by evidence introduced by the party carrying the burden of proof. No such evidence was produced by the government here. All it can muster is the unsupported claim that petitioner's misrepresentations about his date and place of birth "were clearly for the purpose of obtaining benefits under the immigration laws" (Br. for the U.S. at 46). This falls far short of the burden it must carry to show petitioner's state

of mind, his "purpose" or intent, in misstating these facts.

CONCLUSION

For the foregoing reasons, amici urge this Court to reverse the decision of the Court of Appeals, and remand the case with the direction that it be dismissed.

Respectfully submitted,

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